1941

Clarabell Kelley v. Salt Lake Transportation Company, and Green Cab Transportation Company, and Lewis Hartley : Appellants' Abstract of Record

Utah Supreme Court

IN

The Supreme Court

OF THE

State of Utah

CLARABELL KELLEY,
Plaintiff and Respondent,

vs.

SALT LAKE TRANSPORTATION COMPANY, a corporation, and GREEN CAB TRANSPORTATION COMPANY, a corporation, and LEWIS BARTLEY,
Defendants and Appellants.

Case No. 6329

APPELLANTS' ABSTRACT OF RECORD

Appeal from The District Court of The Third Judicial District in and for Salt Lake County, State of Utah.

HON. P. C. EVANS, Judge, Presiding

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APPEARANCES:

E. LE ROY SHIELDS,
Attorney for Plaintiff and Respondent.

INGEBRETSEN, RAY, RAWLINS & CHRISTENSEN,
Attorneys for Defendants and Appellants.

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(Title of Court and Cause)

COMPLAINT

Plaintiff complains of defendants and for cause of action against the defendants alleges:

1-3 1. That plaintiff is a resident of Salt Lake City, Salt Lake County, State of Utah, and that the defendant, Lewis Bartley is likewise a resident of the same place.

2. That the defendant, Salt Lake Transportation Company and the defendant Green Cab Transportation Company are both corporations duly organized and existing under and by virtue of the laws of the State of Utah, with their offices and principal place of business at Salt Lake City, and at all times herein mentioned were engaged in the operation of taxi cabs over and upon the streets of Salt Lake City, Utah for the transportation of passengers for hire within the limits of said city, and that at all times hereinafter mentioned, the defendant, Lewis Bartley was driving and operating a certain taxi cab belonging to said defendant corporations and was at said time engaged in the course of his business and employment for said corporation.

3. That on the 10th day of February, 1940, the plaintiff herein rented a taxi cab from the defendant corporations and driven by the defendant, Lewis Bartley to transport her and her infant child from the Medical Arts Building on east South Temple in Salt Lake City, Utah, to

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her home at 921 West Third North Street in Salt Lake City, Utah and for which transportation said plaintiff paid the regular amount charged for the same to the defendants herein.

4. That said plaintiff was requested by the said cab driver to occupy the rear seat thereof together with her infant child, and upon being loaded into said taxi cab by the defendant, Lewis Bartley, started on her journey home, said taxi cab travelling west on South Temple Street from said Medical Arts Building; that as said defendant, Bartley, operated said taxi cab west on said South Temple Street he did so in a careless and negligent manner and particularly in the following respects, to-wit: That said taxi cab was operated by said Bartley at a high and excessive rate of speed, to-wit: in excess of 35 miles per hour, and that as said cab approached the intersection of South Temple and First West Streets in said City it was travelling at such high and excessive rate of speed; that said defendant, Bartley, failed to keep a proper or any lookout for the traffic upon said South Temple Street and said First West Street and particularly over the intersection thereof, and further failed to keep his said automobile under proper or any control in order to avoid a collision with other vehicles upon said intersection; that said defendant further failed to retard his said speed as he approached the intersection so that he might be able to stop if

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an emergency arose and other vehicles appeared in his path upon said intersection; that as said cab entered the intersection of South Temple and First West Streets aforesaid at said rate of speed above indicated another automobile travelling across the intersection traversed said intersection immediately in front of said taxi cab; that in order that said defendant Bartley avoid a collision with said other automobile so using said intersection, it became necessary that he suddenly apply his brakes and stop, and said defendant did without any warning or caution to the plaintiff herein suddenly set his brakes and suddenly stop his said taxi cab in said intersection.

5. That as a direct result of said defendant's carelessness and negligence in the operation of said automobile as hereinbefore set forth and of his excessive rate of speed and of his failure to keep said cab under proper control which made it necessary for said defendant to suddenly apply his brakes and stop his said cab to avoid a collision with said other automobile, said plaintiff herein was thrown from the rear seat of said cab forward and against the back of the front seat of said cab and was then thrown into the bottom thereof, and by reason of said impact suffered severe injury to her body in the following respects, to-wit: bruises and contusions of her arms and legs, a severe twist and wrench to her back immediately in the vicinity of the

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small of her back; that so badly was her back wrenched and injured that it became necessary that her body be taped and sustained in tape for a period of approximately 2 to 3 weeks, during all of which time said plaintiff herein was confined to her bed at her home; that as the result of said injury, said plaintiff suffered great and excruciating pain to the extent that she was unable to obtain any sleep or rest for a period of 1 week after said accident, and that said plaintiff further received a great nervous shock to her nervous system and ever since said time has been nervous to the extent that it is difficult for her to obtain any rest when she goes to bed at night, and plaintiff is advised and believes and therefore alleges that she will be and remain in a nervous and shocked condition for a long period of time to come.

6. That said plaintiff's injury and resulting damages was due wholly and solely to the carelessness and negligence of the defendant, Lewis Bartley, while in the course of his employment for the defendants, Salt Lake Transportation Company, a corporation and Green Cab Transportation Company, a corporation, which said carelessness and negligence was the direct and proximate cause of said injury and resulting damages to the plaintiff's damage in the sum of $1,000.00.

7. That plaintiff of necessity had to em-

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ploy the services of physicians and has contracted to pay for such services the sum of $35.00, which plaintiff alleges is a reasonable fee for the services so rendered.

8. That plaintiff was further required to employ the services of a nurse to care for her during the first week after her injuries and paid for such services to said nurse the sum of $15.00 which said plaintiff alleges is a reasonable fee for such services.

WHEREFORE, plaintiff prays judgment against the defendants and each of them for the sum of $1,000.00 general damage and the further sum of $35.00 doctor bill and $15.00 nurse's fee, a total of $1,050.00, and that plaintiff have her costs herein and such other and further relief as is deemed meet and equitable in the premises.

E. LE ROY SHIELDS
Attorney for plaintiff

Duly verified

(Title of Court and Cause)

ANSWER

Come now the defendants above named, and for answer to plaintiff's complaint on file herein,
9-11 admit, deny, and allege as follows, to-wit:

1. Admit the allegations of paragraphs 1, 2 and 3 of said complaint.

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2. In answer to paragraph 4 of said complaint, these defendants admit that after plaintiff and her infant child became occupants of said cab, the defendant Lewis Bartley started them on their journey home, and that he drove said taxicab west on South Temple Street from the Medical Arts Building in Salt Lake City, Utah; deny each and every other allegation, matter or thing in said paragraph 4 of said complaint contained, and particularly deny that said defendant Lewis Bartley was negligent or careless, as alleged in said paragraph, or at all.

3. The defendants deny each and every allegation, matter or thing in paragraph 5 of said complaint contained.

4. These defendants deny each and every allegation, matter or thing in paragraph 6 of plaintiff's complaint contained.

5. In answer to paragraph 7 of said complaint, these defendants allege that if the plaintiff has employed the services of physicians, and has contracted to pay for such services the sum of $35.00, or any sum, the necessity for such employment, if any, did not arise because of any want of care or fault upon the part of these defendants, or any of them.

6. In answer to paragraph 8 of said complaint, these defendants allege that if the plaintiff did employ a nurse and paid said nurse the sum of $15.00, as alleged in her cmoplaint, or

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any sum, the necesity therefor did not arise because of any want of care or fault upon the part of these defendants, or any of them.

7. These defendants deny each and every allegation, matter or thing in said complaint contained not hereinabove expressly admitted or qualified.

As a further and affirmative defense to plaintiff's complaint, these defendants allege that shortly after the 10th day of February, 1940, the plaintiff asserted to defendants that she had suffered injuries because of an accident which occurred upon that date, and asserted that said accident occured through some fault on the part of the defendant Lewis Bartley, who was driving said cab; that the defendants, at said time, denied that there had been any negligence, and denied that there was any responsibility therefor, but nevertheless, in order to fully compose and settle said dispute, and to discharge any possible claims which plaintiff might have, defendants, on February 21, 1940, paid to the said plaintiff the sum of $20.00, of which said sum the plaintiff acknowledged receipt in writing and in consideration thereof, released and forever discharged the defendants and each of them from all claims, demands and rights of action of every kind which she then had or should thereafter have on account of any injury or other damage growing out of the accident referred to in her

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complaint by reason whereof the said plaintiff is now estopped and barred from asserting or claiming any further rights or recoveries against the defendants upon the cause of action purported to be set out in her said complaint.

WHEREFORE, defendants pray that said complaint be dismissed, and that they have judgment for their costs of action herein incurred.

INGEBRETSEN, RAY, RAWLINS, & CHRISTENSEN

Attorneys for Defendants

Duly verified

Received copy of the foregoing Answer this 30th day of April, 1940.

E. LEROW SHIELDS

Attorney for Plaintiff

(Title of Court and Cause)

REPLY

Comes now the plaintiff and in reply to the further and affirmative defense of the defendants herein admits, denies and alleges as follows:

12-14 1. Plaintiff admits that shortly after February 10, 1940, she asserted to the defendants that she had suffered injuries becase of an accident which occured upon that date, and that said accident occured through the fault of the de-

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fendant, Lewis Bartley who was driving said cab as an employee of and in the course of the business of the transportation companies, defendants, and admits that on February 21st, 1940, said defendants tendered to the plaintiff the sum of $20.00, but denies that said plaintiff released and forever discharged the defendants and each of them from all claims, demands and rights of action of every kind which she then had or should thereafter have on account of said injury or damage growing out of this accident referred to in her complaint, and plaintiff denies that she is now estopped and barred from asserting or claiming any further rights or recoveries against the defendants upon her said cause of action, and in further reply thereto alleges that after said accident, said plaintiff was confined to her bed and suffered great physical pain and soreness to her body by reason of her injuries sustained in said taxi cab as alleged in her complaint, and while so suffering, two agents of said defendants, transportation companies, came to her home and through fraud and misrepresentation obtained the signature of said plaintiff to a purported release and left with said plaintiff the sum of $20.00; that said misrepresentation and fraud consisted of said agents stating to said plaintiff that she would never be able to recover any damage against them by reason of her injuries and that unless she signed said paper, that they would pay her no sum or sums for her

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injuries and that she could not collect any sum or sums from them by reason thereof and that unless she signed said release, said defendants would not pay the doctor bill for the services of the doctor in rendering assistance to said plaintiff, nor would they pay any further expense of any kind or nature either as doctor bills or otherwise; that at said time said plaintiff was badly in need of the services of a doctor and had no money of her own with which to pay the reasonable expense incurred for her medical care, and at said time said plaintiff was in great pain and suffering as to her physical body and was greatly distressed mentally and feared for her physical condition if she was unable to obtain the services of a doctor, and for said reason and by reason of said misstatements and representations made to her by the agents of said defendants, she signed a paper that was produced by said agents and which she was requested to sign and which she signed without knowing the contents or purport of the same; that said plaintiff had already employed an attorney, to-wit: E. LeRoy Shields to represent her in said matter and so advised the agents of said defendants who further stated to her that she did not need the services of an attorney to handle the matter, that they would take care of her; that shortly after said agents left plaintiff's said home, she phoned to her said attorney who immediately came to her home and advised her that the

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representations made to her by the agents of said defendants were unfounded and untrue and said plaintiff upon such advice immediately returned to said defendants the money left with her, to-wit: the sum of $20.00 and in writing advised said defendants that she would not be further bound by the provisions of any release which she had signed; that by reason of the matters herein alleged, said plaintiff is not estopped from asserting her claim in this action against said defendants and each of them.

WHEREFORE, plaintiff prays that defendants take nothing upon their further and affiramative defense, but that the same be dismissed and that plaintiff recover judgment as prayed for in her said complaint, and that plaintiff have such other and further relief as is deemed meet and equitable in the premises.

E. LE ROY SHIELDS

Attorney for Plaintiff

Duly verified.
Served May 9th, 1940.

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15 Entered order assigning the case to Division 6 before the Honorable P. C. Evans, for trial.

16 Demand for trial, certificate and order setting the case for trial on the 9th day of September, 1940, at ten o' clock A. M.

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17 Entered order commencing trial impaneling jury, relating to proceedings on first day of trial, denying defendants' Motion for a non suit and continuing case to Tuesday, October 8, 1940.

BILL OF EXCEPTIONS

43 BE IT REMEMBERED that on October 7, 1940, the above entitled cause came on regularly for trial before the Honorable P. C. Evans, judge, sitting with a jury, the respective parties being represented by counsel, as follows:

For the Plaintiff: E. LeRoy Shields, Esq.

For the Defendants: Ingebretsen, Ray, Rawlins & Christensen, by J. M. Christensen, Esq.

The parties announced that they were ready for trial, and thereupon the selection and examination of prospective jurors was commenced and proceeded with until eight jurors had been selected, examined and sworn for the trial of this cause.

43-45 Opening statement made by Mr. Shields, attorney for the plaintiff.

MR CHRISTENSEN: We will reserve our statement.

46 *Clarabell Kelley,* the plaintiff herein, was called as a witness on her own behalf, and being duly sworn, testified as follows:

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Direct Examination

That she is the plaintiff in the action. That on February 10, 1940, she resided at 921 West Third North Street, Salt Lake City, Utah; that on that date she had taken her young son to the Medical Arts Building to have some teeth extracted; that when the boy was able to leave she called a cab and went downstairs and waited until the cab came for her, a Green Cab. She and the
47 child got into the cab. The cab turned in the intersection between Main and State and started west on South Temple. There were no stops. It went directly through to First West. He did not have to wait for the light. He had a green light. The cab was going about 25 or 30 miles an hour when it came to the intersection at First West. That the brakes were applied suddenly and it stopped with such a jerk that it threw her against the front seat and back down into the bottom of the cab. That she struck the front seat; that the back of the front seat struck her side and ribs
48 back to her spine, all over her hip. That she was knocked out of breath for a few seconds. That she said to the driver, "This is a fine place for me to be, down in the bottom of the cab.". He said, "Well, if you had been looking, you could have braced yourself. We almost had a collision with another car." That she did not see which car it was; that there was a car that dashed by quickly as he applied the brakes

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and stopped. That she went home. That her
49 side hurt continuously. That she was not able to wait on herself. That she tried to get in touch with the officials of the cab company. That she was hurt on the 10th of February, and that she made contact with Mr. Boynton on the 13th. That she called the cab company repeatedly during the time between the 10th and the 13th. That she got in touch with Mr. Boynton of the cab company, and told him of the accident; that he said there was a report, and asked her if
50 she knew Dr. Landenburger or Dr. Ross Anderson or Dr. Spencer Wright, to which she said no. That Mr. Boynton sent her to Dr. Wright. She went to the Medical Arts Building the afternoon of the 13th. He made an examination of her standing up, and told the nurse to give her an electrical treatment, and he taped her back. That she took the streetcar home, and went to bed. That she had a nervous chill. That her niece, Miss O'Keefe, came down on Wednesday morning to be with her, and was there with her six or seven days. That the Relief Society teacher came in and got her extra help, which she had to pay for, and Miss O'Keefe charged $1.00 a day for
51 the seven days; that she is indebted to Miss O'Keefe $7.00 for that service. That the other lady who came in was there three days, and she owes her $1.00 a day for each of such days. That Dr. Wright came down Wednesday morning be-

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cause she had had a terrible chill, and he said there was nothing more he could do for her. That Dr. Byron Reese came down. That he did nothing but advise her, and said he would go back and
52 talk to Dr. Wright about an x-ray, he said she needed an x-ray. That she saw no more of him. That she called Dr. Howard T. Anderson. That about the 18th Dr. Anderson came in; that he took the tape off; that he made an examination of her back. That Dr. Anderson told her she
53 was injured in the vicinity of her lower ribs and through her back, and he would like an x-ray; that she went to the Medical Arts Building and was x-rayed by Dr. Anderson, and was taped, and that Dr. Anderson made two trips to her home. That she has had no medical attention since then. That she has not recovered, and her
54 back still bothers her if she does extra hard work or much reaching or walking; that her rib pains her.

Cross Examination

56 That the car which came in front of the cab was travelling faster than the taxicab was travelling. That Mr. Boynton of the taxicab company made a trip to her home. That she went to and from Dr. Wright's office on the 13th of February
57 on the bus. That Dr. Wright came to see her on or 14th. That Dr. Reese came out on the 15th
58 or 16th. That the only thing he did was put an extra piece of tape on her back. That Dr.

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Anderson came out after Dr. Reese. That Mr.
59 Boynton came out while she was in bed, and another gentleman came with him. That they told her they would see that she had good medical attention. They told her she could go back to Dr. Wright if she liked. That she can't remem-
60 ber whether they told her that if she didn't like Dr. Wright she could choose her own doctor. That they told her they would pay for her help and that that was all she could get, and it didn't matter whether she called an attorney or not. That they would give her $20.00, and that was all she would get, regardless of what happened. That the $20.00 was to cover the expenses of the
61 help, and that the cab company would pay Dr. Wright's charges. That the signature "Clarabell Utley Kelley" on Exhibit 1 is her signature. That she signed it in the presence of Mrs. W. M. Allred on the 21st day of February, 1940. That when she signed it, she received $20.00 in cash.
62 That both Dr. Reese and Dr. Anderson were doctors of her own choosing.

Redirect Examination

63 That it was a week or longer after she was injured that Br. Boynton and the other gentleman came to her house. That she was hurting all over and her back was bothering her and she was sick and nervous when they came. That they told her they would allow her $20.00 for help. That she told them she was entitled to more than that.

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64 That she had already called Mr. Shields, her attorney, and Mr. Boynton told her that it didn't matter whether she employed an attorney or not, and that if she didn't take the $20.00, she would not get anything at all. They asked her if she had employed an attorney, and she said, "Well, they had discussed an attorney. That they said there was no use having an attorney; that it could be settled without an attorney for the sum of $20.00 and that was all she was entitled to. That they
65 told her she would get no more medical attention unless she signed the release, and she signed the release on that representation, and then got in touch with her attorney. That she returned the
66 $20.00 to her attorney, Roy Shields.

Whereupon, it was stipulated that the plaintiff, or her attorney, got a check and tendered it back to the Salt Lake Transportation Company and Green Cab Company, the check being dated February 23, 1940; that the check has now been endorsed and tendered back to the plaintiff in court, whereupon plaintiff's Exhibits A and B,
67 Exhibit A being a letter addressed to Salt Lake Transportation Company by Mr. Shields and B being a cashier's check of Walker Bank & Trust Company in the sum of $20.00, were offered and admitted in evidence.

MR. CHRISTENSEN: Just so the stipulation will be clear may it show, Mr. Shields, that the check is endorsed by both payees and that it is

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now tendered to the plaintiff?

MR. SHIELDS: Yes.

Recross Examination

68 That Mr. Boynton and the other gentleman came out to see her about a week after the accident. That the accident occurred on the 10th of February and that the release is dated the 21st of February, which was the correct date. That the release was signed on the second trip
69 of Mr. Boynton. That she does not remember him telling her when she signed the release that she could go to Dr. Wright for treatment as long as she liked, and if she didn't like Dr. Wright, she could choose her own doctor and the cab company would pay for it. That at the time the settlement was made her brother, Mr. Utley, was present, and overheard the conversations. That her brother advised her to make the settlement, as she would
70 probably get no more out of it. That her brother was present when she consented to the settlement. That though now desceased, he was 49 years of age at the time of the settlement. That at the time the settlement was discussed, Mr. Boynton didn't have the release or the money present.
71 That another gentleman came out subsequently on the same day with the release and the money. That she signed the release in the presence of Mrs. Allred, who acted as a witness. That when
72 Dr. Reese examined her on one occasion, he ad-

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vised her that no further treatment was necessary.

Redirect Examination

That Mr. Boynton first came to see her about the 15th, that is, two days after she had been at Dr. Wright's office. That he offered her a $10.00
73 bill to defray her expenses while she was in bed. That she refused to take the $10.00 bill.

Howard T. Anderson, a witness produced on behalf of the plaintiff was sworn and testified as follows:

Direct Examination

That he is a practising physician, located in the Medical Arts Building. That he is acquainted with the plaintiff, that he saw her about
74 the last of February 1940; that she was sent to him for an x-ray examination; that he took an x-ray; that the x-ray showed no bony injury to the lower spine or the ribs or the pelvis. That there was no bony injury discernible in the x-ray. That at the time he made no examination other than the x-ray. That a few days subsequent to this, he examined her at her home. That she had a tenderness in the back in the lumbar region, and a muscle spasm of the lumbar muscles, and upon raising or flexing her leg on the hip, she would complain of pain over the right hand region of her back. That he advised her that
75 he thought her injury was a mild sacro strain of

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the back muscles, and that the treatment should be rest with heat applied. That she told him she had been thrown against the seat in a cab, and since that time she had had pain in her back. That that could have caused her injury. That he taped her back with adhesive tape.

Cross Examination

76 That the x-ray would not disclose a strain or bruises. That he had to rely on her statements as to whether there was or was not injury or pain in the muscles or tendons. That there are other signs which if present would corroborate that. That he saw the patient two or three times. That he would normally expect in time complete recovery.

Redirect Examination

77 That his bill was $18.00, and that it is still due.

78 *Ruby O'Keefe,* a witness produced on behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

That she resides at Salt Lake City, and is acquainted with the plaintiff. That she went to plaintiff's home during the month of February, 1940, and rendered service there. That she went on the 14th of February, and Mrs. Kelley was in bed. That she stayed for about a week, during

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which time Mrs. Kelley remained in bed. That she took Mrs. Kelley her meals, and she couldn't get out of bed at all. That she had an agreement with Mrs. Kelly with respect to what she would
79 be paid, which was $1.00 a day.

Whereupon plaintiff rested, and Mr. Christensen advised the Court that he had a matter which he would like to present in the absence of the jury, whereupon the jury was admonished, excused and retired. Mr. Christensen then moved and argued for a non-suit upon the following
80-83 grounds: One, that there was no evidence showing any negligence at all on the part of the cab driver, and secondly, that there was no pleading or proof of any facts sufficient to avoid the effect of the release, Exhibit A.

THE COURT: The motion will be denied.

84 Whereupon, on Monday, October 9, 1940, at 2:00 o'clock P.M. the court reconvened. Mr. Christensen made a brief statement of defendants' case.

87 *Spencer Wright,* a witness produced on behalf of the defendant testified as follows:

MR. CHRISTENSEN: Do you question the doctor's qualifications?

MR. SHIELDS: Not at all.

Direct Examination

That his name is Spencer Wright; that he is

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a licensed and practising physician and surgeon in Salt Lake City, Utah. That he had occasion to see Mrs. Kelley, the plaintiff in this case on Feb-
88 ruary 13th or 14th, 1940. That she came to his office, and he went to her home. That he examined her; that she complained of pain in the lumbar region of her back; that she was thoroughly examined in the office, and it was found that she had some sore muscles; that there was no other injury, and her injury could only be determined by her complaint of pain. That there was no evidence on the skin of any bruising or injury. That there was no evidence which indicated to him that it
89 would be advisable to have an x-ray, and that he took none. That he gave her an electrical treatment in the office and strapped her back to support the muscles. That he saw her again. "There were a number of telephone conversations over the period of the next week, and on one occasion, to further be sure, he went down and saw her at home. He thinks possibly two days after, an interval, or possibly of one day, and he examined her at her home. That he discovered the same condition as he had reported before. That he would expect the con-
90 dition he found to heal itself in a week or two. That she should have been perfectly normal and have forgotten about it. That she appeared to be an extremely nervous type of person, and that that condition had existed for some time. That it was not caused by the accident.

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Cross Examination

That the representative of Salt Lake Transportation Company first talked to him about Mrs. Kelley. He was told that she would be in his office for examination. That he was employed
91 by them in this case. That there was an understanding that they would pay him. That he represents that company frequently. That he examines their employees. That in such cases he
92 frequently examines a patient standing up; that
92 that would be perfectly all right from his standpoint. That he examined her thoroughly; that he felt with his hands around the regions that she said were sore, and she complained when he would touch where she said it was sore. That he ordered his nurse to give her an electrical treatment, and he bound her with tape to support
93 her back. That the conversations he had over the phone during the next week were with persons at the residence of Mrs. Kelley, and he went to her house and made a further examination. That he
94 satisfied himself that the injuries were those of a muscular nature, from which people recover, and which people sustain in falls. That use and activity, and not rest, is the thing which will restore the condition about which she compained. That she should not have been confined to her
95 bed at all. That staying in bed would mitigate against her best recovery.

"Q. Would you think the injury was such,

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if she was still feeling the effect of it, not constantly, but when she walked considerable distances, or when she worked extra hard, she would feel the effect of it, do you think that would be the result of the injury?

A. To feel the effect, those words are very variable, and if she desires to cherish it, she could feel the effect of that for a long period of time, if she desires to.

Q. You mean by that it is a mental condition, and not physical?

A. I think it can be forgotten.

Q. Can be forgotten?

A. Yes sir.

Q. And even though a pain came in the back, the mind could rid her of it?

A. Yes, sir."

96 *Clarabell Kelley,* recalled for further cross examination testified:

Cross Examination

That she had told Mr. Boynton and the other gentleman when they came that she had employed an attorney; that she said, "We had discussed the case with an attorney." That she was positive she named the attorney before them. That at that time she had a telephone in the house;

97 that her brother was there at that time; that she could have had her brother call the attorney.

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Redirect Examination

98 That her brother, at that time, was in a nervous state of mind; that he was not in sound mind; that he had been treated in the mental 99 hospital at Provo, and had just been released.

100 *Lewis Bartley,* a witness produced on behalf of the defendants, testified as follows:

Direct Examination

That he lives in Salt Lake City, Utah, and was the driver of the cab involved. That he had been driving a taxicab for four years, and is 43 years of age. That he saw the plaintiff on February 10, 1940. That he got an order to go to the Medical Arts Building, where he received Mrs. Kelley and her child. That she directed him 101 where to go; that he made a U turn in front of the Medical Arts Building and proceeded west; that as he approached First West and South Temple, there were two cars stopped and waiting to go through; that he proceeded to slow up; that as he got within 30 feet of the parked cars, they went on through, and he followed them; that he looked to the left and it was clear as far as he could see; that he could see a third of the way down; that he looked to the right and it was clear, so he started to go through and glanced at the left again and a car came up in front of him, going about 40 miles an hour. That he could see he couldn't get through so he hit the brakes and

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stopped. That he looked back and saw Mrs. Kelley was pulling herself up from the bottom of the car; that he asked her if she was injured and she said "I think I strained my back a little."
102 That he took her home and got out of the cab and asked her if he could help her or carry the baby for her; that she said "No, I am all right. Forget it". That when he entered the intersection he was going between 20 and 22 miles an hour. That the two cars in front of him went on through. That he does not think he could have gotten through because of the car which came from the south.

Cross Examination

103 That he does not remember whether he made any stops between the Medical Arts Building and First West. That he doesn't remember
104 whether he stopped at the West Temple light. That while he didn't glance at his speedometer, his best judgment is that he was going from 22 to 23 miles an hour between Main Street and
105 West Temple Street. That the car which went in front of him was coming from the south on the east side of First West Street. That he looked
106 down to the left; that he was about 20 feet from the intersection when he looked down the block.
107 That he could see a good distance down the block; that he didn't see the car coming. That he does not know how many feet it takes to make a third of a block; that if the blocks are 800 feet long,

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and the other car was traveling 40 miles an hour,
108 it would not have travelled 300 feet while he was going 25 feet; that his speeds and distances are esti-
109 mations. That the other cars had gone on through the intersection before he reached it; that he was not looking toward the north when he suddenly discovered the car coming from the south.
110 That technically he had the right of way, but does not think he could have gone on through; that he gave Mrs. Kelley no warning that he was going to stop; that he had no time to do that; that he stopped very suddenly. That he didn't
111 see the car coming from the south until it was right on him, so close that it necessitated shoving on the brakes to avoid a collision.

112 *Charles A. Boynton, Jr.,* a witness produced on behalf of the defendants, testified as follows:

Direct Examination

That he is an agent of the defendant corporations. That he had some conversations with the plaintiff before he ever saw her. That on the morning of the 12th or 13th of February, Mrs. Kelley called the office and contacted him, and told him that she was suffering some pain as the result of an accident in a Green Cab on Saturday the 10th of February; that the following day was Sunday, and the 12th was a holiday, and that it was to the best of his recollection Monday when
113 Mrs. Kelley called. That when Mrs. Kelley told him that she was having some pain as a result

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of the accident, he suggested that she go, at the defendants' expense, to the office of Dr. Wright, and have him examine her; that he called Dr. Wright and asked him to examine her, and to call
114 him afterward. That two days later he learned that Mrs. Kelley was going back to Dr. Wright's office for further treatments; that thereafter some person called from Mrs. Kelley's house and said that Mrs. Kelley was confined to her bed, and wanted to see a doctor, and that he again called Dr. Wright and asked him to call on Mrs. Kelley, which he did. That on approximately the 14th or 15th, he and Harold S. Jennings went to Mrs. Kelley's residence. That Mrs. Kelley was
115 in bed. That Mrs. Kelley indicated that she would prefer to have some other doctor examine her; that they told her they could not authorize any further medical expense under the circumstances, but that if she wanted to call her own doctor, she was certainly free to do so. That he did not offer Mrs. Kelley $10.00 at that time. That nothing was said about Mrs. Kelley having
116 consulted an attorney; that his next contact with the matter was when Mr. George Utley, the brother of the plaintiff, came to defendants' office. That as a result of that call, he telephoned Dr. Byron Reese. That Dr. Byron Reese called on the plaintiff. That pursuant to that
117 call, he and Harold S. Jennings went to the residence of Mrs. Kelley. That Mr. Utley was there; that Mrs Kelley was in bed. That Mr. Utley

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118 appeared to be a man of sound health and mind. That Mrs. Kelley consulted him as to what she should do. That Mr. Utley expressed the opinion that Mrs. Kelley should take what was offered. That this was on the 21st day of February. That
119 Mrs. Kelley was told that the defendants would pay her $20.00 and all doctor bills that had been incurred, and that they would further pay doctor bills as long as she was under the treatment of Dr. Wright, if she would go to him and take treatments until he released her; that she said "Well, all right", and later on the same day signed the release. That the sum of $20.00 was fixed, and she was paid that amount to cover the cost of her household help. That the $20.00 was given her
120 in currency, and that the defendants later received back a cashier's check with the letter marked Exhibit A from Attorney Shields. That the defendants have caused the check to be endorsed. That they never accepted it, and they tendered it back in court for the benefit of the plaintiff. That Mrs. Kelley made the statement that she did not see any use of getting an attorney, in no way indicating to him that an attorney
121 was employed. That she did not mention the name of Mr. Shields. That he expressed the idea that the driver had used due care, and that the defendants were not liable for any claims she might present.

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Cross Examination

That he took Mr. Jennings out with him so that he would be present during the conversation and be able to be a witness. That on the day the release was signed, Mr. Utley called and said
123 they were ready to talk final settlement. That the defendants were interested in making a settlement to save legal expense; that he went out purposely, and took Mr. Jennings with him, to
124 make a settlement, and that they had in mind offering the plaintiff $20.00. That when they arrived, Mrs. Kelley was in bed, and complained
125 that she was still suffering; that they indicated to her that they were willing to pay $20.00, and that that was all they would give her under the circumstances, and the doctor's bills and the
126 future treatment. That they told her they were willing to pay her $20.00 and the doctor's bills and other medical treatment, and they didn't consider themseves liable for anything. That the $20.00 was to cover all services in the house; that Mrs. Kelley said she ought to have something for her injury, and he said that they were paying her $20.00 because of the fact that they wanted to take care of her, although they didn't feel
127 that they were liable. That he didn't say she could get nothing more, and that she said nothing about an attorney; that he told her they would authorize no further medical service until a basis of complete understanding could be arrived at.

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That their offer to pay the doctor's service was conditioned upon her signing the release. That
128 if she hadn't signed the release, there would have been no further medical service, so far as the
129 defendants were concerned. That the proposition discussed with Mrs. Kelley, and in consideration of which the release was signed, was not only the $20.00, but the payment of all past doctor bills and future medical service.

130 *Lewis Bartley* recalled for further cross examination testified:

Cross Examination

I turned to see Mrs. Kelley right in the bottom of the car. . . . You get a pretty good start when someone looms up in front of you that way.

Q. You mean when you recovered from the fright you received?

A. Yes.

Q. You were frightened, weren't you?

131 A. Just temporarily."

Whereupon *Harold S. Jennings* was called as a witness and it was stipulated that he would testify to the same effect as the witness Boynton.

Clyde H. Day, a witness produced on behalf of the defendants, testified as follows:

Direct Examination

That he is employed by the Salt Lake Trans-

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portation Company. That he saw Mrs. Kelley on the 21st of February, 1940. That he was asked by Mr. Boynton to deliver a release and $20.00 to Mrs. Kelley, which he did at about 10 o'clock in the morning of that day; that the release, Exhibit 1, was signed in his presence both by Mrs. Kelley and Mrs. Allred, as a witness; that he left the $20.00 with Mrs. Kelley. That
133 he found Mrs. Kelley in bed reading a book; that he told her he had brought the release to be signed, and she said "Well, that is the terms Mr. Boynton and I agreed upon. We thought it best to agree upon a settlement, we have always been users of taxicabs, and we will have to continue to use them in the future." That Mrs. Kelley put the release on a book she was reading to sign it. That he handed the release to Mrs.
134 Kelley and she read it over. That she was at least three or four minutes looking at it before she signed it. That Mrs. Allred was in the bedroom at the time Mrs. Kelley signed it.

135 Whereupon *Clarabell Kelley* was recalled in rebuttal, and testified as follows:

That Mr. Bartley did not offer to assist her out of the cab and into the house the day he brought her home; that he said nothing about it. That she never solicited or authorized her brother to negotiate with the defendants for her, except just at one time he called from the home to see what assistance the cab company would give her.

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136 That she did not say to the witness Day that she had agreed to a friendly settlement with Mr. Boynton. That he brought the release into the bedroom, and said "You can just sign here, Mrs. Kelley", and there was a book to write on on the bed and she put the paper on the book and signed it, and that he went into the other room and had
137 Mrs. Allred sign the paper. That when she arrived home on the evening of the injury, she carried the baby into the house herself.

139 Whereupon, all parties rested.

140 On Tuesday, October 8, 1940, at 10 o'clock A. M., court reconvened. The jury was admonished and excused and counsel for the defendants moved for a directed verdict in favor of the defendants and against the plaintiff upon the fol-
141 lowing grounds: one, "That there is no proof of any negligence sufficient to charge the defendants, or any of them, with liability," and, second "That there is no pleading or proof of any fact or circumstances which would avoid the release."

"THE COURT: The motion for a directed verdict is denied."

INSTRUCTIONS TO THE JURY

Gentlemen of the jury, the issues in this case have been stated to you and need not be reiterated at length. The two questions are, first, was the defendant negligent in driving the automo-

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bile. If you find that the defendant was negligent in driving the automobile, then your verdict should be for the plaintiff. If, on the other hand, you find that the defendant was not negligent and was exercizing due care at the time of the accident, your verdict should be for the defendant.

The question of negligence is not determined by the speed, as to what the speed of the car was, the legal rate of speed. The testimony is from twenty-two to thirty miles an hour. It is testified by the witnesses that the speed varied between those figures. Now, that might have been, or might not have been negligence, depending entirely upon the circumstances as to whether the driver had the car under sufficient control to act in an emergency in approaching an intersection.

Instruction No. 2

The other question is as to whether the release is binding upon the plaintiff. There is some dispute in the testimoney as to the circumstances under which that release was procured. A release should be voluntary, and with a full knowledge of all of the facts. So, you are instructed that it is claimed by the plaintiff that she was induced to sign said release by statements made by the persons who procured the same, as shown by the instructions of the Court. You are there-

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fore instructed that if you find from the evidence that the officers of said companies went to the home of said plaintiff and there stated and represented to her that they had made an investigation of said accident, and that it was a non-liability case; that if plaintiff brought an action to recover damages she could not prevail because there was no liability on the part of the company on account of said accident, and that the payment of twenty dollars, which they were offering her, was a mere gratuity, a customary gesture of good will in non-liability cases, and that if she were to bring a suit against the defendants she could not recover any damages, and said offer would be withdrawn, and if you further believe from the evidence that the plaintiff was at the time suffering from pain and distress by reason of her injury, and was in need of medical care, and it was a mere gratuity, a customary gesture of good defendant companies who procured said release, that unless she signed the release they would not furnish her with additional medical care and attention, and if you further believe that plaintiff relied upon such statements, and believed them to be true, and that the plaintiff had no money with which to employ physicians for her medical care and attention, then I instruct you that said release would not be binding upon plaintiff and you should disregard the same, and should award her such damages, if any, that you may find she is entitled to by reason of her in-

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juries, not exceeding, however, the sum of one thousand and fifty dollars, one thousand dollars general damages, and thirty-five dollars doctor bill.

MR. SHIELDS: May that, under the evidence, now be amended to read eighteen dollars. It appears that Dr. Reese and Dr. Wright was paid by the company.

THE COURT: Yes.

MR. SHIELDS: May that be amended to read eighteen dollars?

THE COURT: Eighteen dollars, and how about the nurse's fee?

MR SHIELDS: The nurse's fee, the evidence shows, was fourteen dollars.

THE COURT: Fourteen dollars. I think that covers the issues.

(Title of Court and Cause)

Plaintiff's Proposed Instruction No. 1

You are instructed that one of the defenses set up by the defendant is the release pleaded by the defendant and admitted by the plaintiff.

19 You are further instructed that it is claimed by the plaintiff that she was induced to sign said release by statements made by the persons who procured the same as shown by the instructions of the Court. You are therefore instructed that

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if you find from the evidence that the officers of said defendant companies went to the home of said plaintiff and there stated and represented to her that they had made an investigation of said accident and that it was a non-liability case; that if plaintiff brought an action to recover damages, she could not prevail because there was no liability on the part of the Company on account of said accident, and that the payment of $20.00 which they were offering to her was a mere gratuity, a customary gesture of good will in non-liability cases, and that if she were to bring a suit against the defendants, she could not recover any damages and said offer would be withdrawn, and if you further believe from the evidence that the plaintiff was at the time suffering from pain and distress by reason of her injury and was in need of medical care, and that it was represented to her by the officers of said defendant companies who procured said release that unless she signed the release they would not furnish her with additional medical care and attention, and if you further believe that plaintiff relied upon said statements and believed the same to be true, and that the plaintiff had no money with which to employ physicians for her medical care and attention, then I instruct you that said release could not be binding upon the plaintiff and you should disregard the same and should award her such damages, if any, that you

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may believe she is entitled to by reason of her injuries.

(Title of Court and Cause)

Defendant's Requested Intsruction No. 1

20 The Court instructs you to find a verdict against the plaintiff and in favor of the defendants, no cause of action.

Refused.

Evans J.

Defendants' Requested Instruction No. 2

The Court instructs you that the defendants, in their answer, plead a release by the plaintiff of her cause of action. The plaintiff, by her reply
21 and by her testimony, admits that she executed such release, but alleges that the execution thereof by her was procured by fraud. The plaintiff alleges that "said misrepresentation and fraud consisted of said agents stating to plaintiff that she would never be able to recover any damage against them by reason of her injuries and that unless she signed the paper, that they would pay her no sum or sums for her injuries and that she could not collect any sum or sums from them by reason thereof, and that unless she signed said release said defendants would not pay doctor bill for the services of the doctor in rendering assistance to the plaintiff, nor would they pay any further expense of any kind or

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nature either as doctor bills or otherwise . . . "

The Court instructs you that in order to avoid the release on the ground that it was procured by misrepresentation or fraud, the obligation rested upon the plaintiff to plead and prove that a misrepresentation of fact was made, that the misrepresentation was false, and that the plaintiff relied thereon to her prejudice. The Court further instructs you that no misrepresentation of facts has been alleged or proved in this case; that the representation that plaintiff would not be able to recover, if made, was a statement of opinion or a prediction of a matter of law, and even if proved, would not avoid the release. The statements that no greater sum would be paid, and that unless the release was signed, the doctor bills would not be paid, constitute expressions of intention, and are not actionable, and do not avoid the release.

Therefore, the Court instructs you that your verdict in this case must be in favor of the defendants and against the plaintiff, no cause of action.

Refused

Evans J.

Defendants' Requested Instruction No. 3

23 The Court instructs you that in this case the positions of the plaintiff and the defendants were at all times adverse; that no confidential or

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other fiduciary relationship existed between plaintiff and defendants, and that there was no duty upon the defendants to advise plaintiff to employ an attorney or otherwise to take counsel before executing the release which she signed in this case.

Refused

Evans J.

Defendants' Requested Instruction No. 4

24 The Court instructs you that a person signing a written instrument is conclusively presumed to know what he is signing, and to acquiesce therein, and is estopped from orally disputing its terms, and if you find from the evidence in this case that the plaintiff did sign the release which has been introduced, and that she did so freely and voluntarily, then the Court instructs you that she is bound thereby, and cannot avoid the same upon the condition that she did not understand its terms.

Refused

Evans J.

Defendants' Requested Instruction No. 5

25 The Court instructs you that if you find from the evidence that the plaintiff was a person of legal age, and that she signed the document in evidence freely and voluntarily, then the matter of consideration is not open for consideration,

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as the plaintiff is bound by the consideration provided for in connection with the execution and delivery of the release.

Refused

Evans J.

Defendants' Proposed Instruction No. 6

140 The defendants request the Court to instruct the jury that if the jury finds that the defendants did in fact state to the plaintiff that they were not liable, and she could not recover, then the jury should further determine whether such expression of opinion was honestly entertained and honestly made, and if the jury finds that such expressions of opinion were made and were honestly entertained, then the Court instructs the jury that the expression of such opinion would not constitute misrepresentation, and that the release could not be avoided on that ground.

Refused

Defendants' Exceptions to Instructions

146 Come now the defendants and except to Instruction No. 2, as given by the Court, and to the whole thereof.

Defendants' Exceptions to the Court's Refusal To Give Requested Instructions

Come now the defendants, and except to the refusal of the Court to give defendants' requested Instruction No. 1.

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Come now the defendants and except to the refusal of the Court to give Defendants' Requested Instruction No. 2.

147 Come now the Defendants and except to the refusal of the Court to give Defendants' Requested Instruction No. 3.

Come now the defendants and except to the refusal of the Court to give Defendants' Requested Instruction No. 4

Come now the defendants and except to the refusal of the Court to give Defendants' Requested Instruction No. 6.

Come now the defendants and except to the refusal of the Court to give Defendants' Requested Instruction No. 6.

VERDICT

28. We, the Jurors impaneled in the above case, find the issues in favor of the plaintiff and against the defendants on the plaintiff's complaint, and assess plaintiff's damages in the sum of Two Hundred Fifty and No/100 Dollars.

Dated October 8, 1940, filed October 8, 1940.

29 Judgment on the verdict in favor of plaintiff and against the defendants in the sum of $250.00, dated October 8, 1940, filed October 8. 1940.

30 Memorandum of Costs and Disbursements in the sum of $27.00, served October 12, 1940, filed October 14, 1940.

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32 Defendants' notice of intention to move for a new trial, served October 14, 1940, filed October 14, 1940.

34 Notice calling up defendants' motion for new trial for hearing, served October 22, 1940, filed October 22, 1940.

35 Entered order denying defendants' motion for new trial, dated October 26, 1940.

36 Notice of overruling and denial of defendants' motion for new trial, served October 26, 1940, filed October 28, 1940.

37-38 Entered order dated Nov. 25th, 1940, extending Defendants' time to prepare, serve and file Bill of Exceptions to and including December 15, 1940.

39-40 Entered order dated Dec. 14th, 1940, on stipulation extending defendants' time to prepare, serve and file Bill of Exceptions, to and including December 31, 1940.

41 Notice of appeal to the Supreme Court of the State of Utah, dated December 30, 1940, served December 30, 1940, filed December 30, 1940.

42 Clerk's certificate, showing that an undertaking on appeal, in due form, was filed on December 30, 1940, and transmitting record to the Supreme Court, dated January 13, 1941.

149-152 Stipulation and order setting Bill of Exceptions, dated December 30, 1940.

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(Title of Court and Cause)

DEFENDANTS' ASSIGNMENTS OF ERROR

Come now the defendants and appellants, and make the following assignments of error upon which they rely for reversal of the judgment of the lower court:

79-81 1. That the Court erred in denying and in failing to grant defendants' motion for a nonsuit in that: (Ab. 22.)

(a) There was no evidence to sustain or justify a verdict or decision in favor of the plaintiff and against the defendants, nor any of them.

(b) The evidence was insufficient to sustain or justify a verdict in favor of plaintiff and against the defendants in that:

1. There was no showing of any negligence on the part of the defendants, nor any of them.

2. There was no pleading nor any evidence sufficient to avoid the effect of the release, (Exhibit 1) executed by the plaintiff in favor of the defendants.

141 2. That the Court erred in refusing and in failing to grant defendants' motion for a directed verdict. (Ab. 34.)

144- 3. That the Court erred in giving its Instruc-

Trans. Page 145 tion No. 2 in this, that there was no dispute in in the evidence as to the circumstances under which the release (Exhibit 1) was procured, nor as to whether or not it was voluntary, the evidence conclusively showing that said release was voluntary, nor was there any allegation or proof of any fact sufficient in law to avoid the effect of such release, and therefore no evidence whatever to justify the giving of said Instruction No. 2. (Ab. 35-37.)

143 4. That the Court erred in its refusal to give defendants' requested Instruction No. 1. (Ab. 39.)

5. That the Court erred in its refusal to give defendants' requested Instruction No. 2. (Ab. 39-40.)

6. That the Court erred in its refusal to give defendants' requested Instruction No. 3. (Ab. 40-41.)

7. That the Court erred in its refusal to give defendants' requested Instruction No. 4. (Ab. 41.)

8. That the Court erred in its refusal to give defendants' requested Instruction No. 5. (Ab. 41-42.)

9. That the court erred in its refusal to give defendants' requested instruction No. 6. (Ab. 42-43.)

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10. That the Court erred in denying and failing to grant defendants' motion for a new trial, for the reason set forth under assignments of error Nos. 1 and 2 hereof. (Ab. 44.)

WHEREFORE, said defendants and appellants pray that the judgment of the district court be reversed for and on account of the errors hereinabove enumerated.

INGEBRETSEN, RAY, RAWLINS, and CHRISTENSEN,

Attorneys for Defendants and Appellants.

Received copy of the foregoing Assignments of Error this 25th day of January, 1941.

E. LE ROY SHIELDS,

Attorney for Plaintiff and Respondent.